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IN THE

# Supreme Court of the United States

The CITY OF RICHMOND, a municipal corporation,
Petitioner

*vs.*

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

The petition of the City of Richmond for a Writ of Certiorari directed to the Circuit Court of Appeals for the Fourth Circuit to bring before the Supreme Court the case of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners, v. the City of Richmond, Respondent.

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To the SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your petitioner, the City of Richmond, a municipal corporation, duly organized under the laws of the Commonwealth of Virginia, respectfully prays that a Writ of Certiorari may be directed to the United States Circuit Court of Appeals for the Fourth Circuit to bring before the Supreme Court of the United States the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners*, v. *The City of Richmond, Respondent*, which was argued before the said Circuit Court of Appeals on November 15, 1916, on a petition to superintend and revise in matter of law proceedings in the

District Court of the United States for the Eastern District of Virginia at Richmond, In Bankruptcy, and was decided against your petitioner on the 14th day of March, 1917. Your petitioner respectfully shows to this Court the following summary of the matter involved, and the general reasons relied on for the allowance of the writ:

The Ainslie Carriage Company, a corporation doing business in the City of Richmond, became so involved financially that on November 4, 1909, receivers were appointed by the Chancery Court of the City of Richmond, on a petition filed for that purpose. At that time the Company was in default for the current year's City taxes, amounting to two hundred and ninety-four dollars ($294), bills for which were then in the hands of the City Collector who was vested with power to distrain, though the taxes might have been paid by the Company at any time prior to January 1, 1910, without having finally become delinquent. They would have finally become delinquent on February 1, 1910, when they would have been turned over to the Collector of Delinquent Taxes who was also vested with the power to distrain. This right to collect its taxes by distress was given the City by its charter and ordinances, without limitation as to time, and, therefore, continued until payment. At the time of the appointment of the receivers the Company was delinquent for the taxes for the year 1908, aggregating two hundred and ninety-four dollars ($294), and for the balance due for the taxes of the year 1907, aggregating one hundred and sixty-nine dollars ($169), bills for which were in the hands of the Collector of Delinquent Taxes to be collected by distress, or otherwise, as above stated. On November 6, 1909, a petition in involuntary bankruptcy was filed in the United States District Court for the Eastern District of Virginia, which was followed by an order of adjudication and reference on February 3, 1910. On February 1, 1910, which was the beginning of a new fiscal year for the City of Richmond, municipal taxes for the year 1910, aggregating $37.63, were assessed, to be paid under the ordinances of the City—one-half in June and the remainder on or before the 31st day of December, subject to a penalty of five per centum (5%) unless one-half was paid on or before the 30th day of June. The respondents admitted liability for

the taxes of 1910, and the Circuit Court of Appeals affirmed liability for that year, but neither the respondents nor the Circuit Court of Appeals allowed or admitted liability for the years 1907, 1908 and 1909—although 1909 was the current year in which the receivership occurred and the tax bills for that year were still in the hands of the City Collector, not having been yet declared delinquent and not having been yet turned over to the Collector of Delinquent Taxes, but being susceptible of payment by the Company to the Collector of Taxes at any time prior to January 1, 1910. The taxes for the years 1907 and 1908 were subject, in addition to the penalty of five per centum (5%), to an interest charge of six per centum (6%) from the time they came into the hands of the Collector of Delinquent Taxes, that being the requirement of the ordinances of the City. The reason given for refusing to allow the claim of the City for the taxes of 1907, 1908 and 1909, both by the Circuit Court of Appeals and by the respondents, was that on November 1, 1909—three days before the appointment of receivers—the respondents, as landlords of the Ainslie Carriage Company, levied a distress warrant upon the property of the Company for rent due as of that day, aggregating two thousand nine hundred and ninety-eight dollars and sixty-nine cents ($2,998.69). The rent year began on April 1, 1908, and the rental was at the rate of two thousand dollars ($2,000) per annum, so that the landlords had permitted their tenant to become delinquent for, approximately, seventeen months' rent. It is claimed by the respondents, and decided by the lower Court, that the City is deprived of its right to taxes for the years 1907, 1908 and 1909 upon the ground of laches on the part of its officers, notwithstanding the continued right to distrain on its part and although for the year 1909 the Collector of Taxes' right to distrain had existed for only two months—having begun on September 1st of that year. It is also insisted by the respondents that the levy of the landlord's distress warrant gave him a lien which supplanted the inchoate lien of the City for its taxes.

The landlord's right to distrain is given by sections 2787, 2790 and 2791 of the Code of Virginia, subject to the pro-

visions of section 2792. The first two sections give the right of distress within five years from the time the rent becomes due. The third authorizes it to be levied on any goods of the lessee or his assignee or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days; with provisions subordinating the landlord to a valid lien existing at the time the goods and chattels of the lessee were carried on the premises and confining him to not more than one year's rent if the lien were created while the goods were on the leased premises, whether the rent accrued before or after the creation of the lien. Section 2791 of the Code of Virginia having prescribed on what goods the landlord might levy, viz., those found on the premises or removed therefrom not more than thirty days, section 2792 of the Code, so far as pertinent, provides: "Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines." The right of the landlord to distrain is thus made expressly subject to "any lien for taxes," and it is submitted that the lien thus referred to is the inchoate lien arising out of the liability to distress. That this provision of section 2792 of the Code of Virginia did refer to the inchoate lien for taxes was conceded in the Court below, and necessarily follows from the fact that the statutes give no express lien, and unless reference is had to the inchoate lien the provision is wholly unnecessary. It would be an entirely useless provision if meant to apply only to a case where an actual distress for taxes had been made, since priority for the taxes would have been already thereby established. Besides, section 622 of the Code of Virginia provides:

> "Any goods or chattels in the corporation or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable or collector. In all cases, property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person, for taxes thereon."

The word "levies" has always been used in Virginia to signify local taxes, as distinguished from state taxes.

Similarly, the charter of the City of Richmond, section 73, provides:

> "All goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods and chattels shall prevent the same being distrained and sold for taxes assessed against the grantor in such deed, while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

Section 51 of the City Charter also provides:

> "It shall be the duty of the said collector (of taxes) on the first Monday in February of each year to turn over to the Auditor of the City all bills, assessments and accounts for all preceding years, upon which there shall then remain unpaid any part of any tax or assessment due the City, and thereupon the City Auditor shall turn over the same to the officer of the City who shall be chosen by the City Council and known as the collector of delinquent taxes * * * the said collector of delinquent taxes shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the City Charter upon the collector of taxes."

In conformity with these charter sections, Chapter 16, Richmond City Code, 1910, and especially sections 3-6-7-8-10-11-20 and 22, which are in all essential respects identical with the same sections of Chapter 14, Richmond City Code, 1899, were enacted, vesting the collector of taxes with power to distrain. These ordinance provisions, as far as pertinent, are as follows:

> "(3). The Collector shall annually give notice in at least three of the daily newspapers of the city, for

fifteen days prior to the fifteenth day of June, that he will attend at his office daily, between the hours nine o'clock A. M. and six o'clock P. M. from the fifteenth to the thirtieth of June, inclusive, for the purpose of receiving from any person charged with city taxes, the whole or one-half of the amount of tax charged; and that five per centum will be added to the whole amount of tax charged in every case where the party assessed shall fail to pay the whole or one-half, within the time so limited. Whenever any person shall fail to pay on or before the said thirtieth of June of each year, the whole or one-half of the amount of tax charged against him or her, there shall be added five per centum upon the whole amount of the tax so remaining due. The collector shall, in like manner, give notice for fifteen days prior to the fifteenth day of December, that he will attend at his office daily, between the above-mentioned hours, from the fifteenth to the thirty-first day of December, inclusive, for the purpose of receiving from any person who has alrady paid one-half only of the city taxes charged to him, the remaining half; and that five per centum will be added to the amount of said remaining half of the tax charged, in every case where the party assessed shall fail to pay the said remaining half within the time so limited. When any person shall have paid, on or before the thirtieth of June, one-half of the tax charged for that year, but shall fail to pay, on or before the said thirty-first day of December of each year, the remaining half of said tax, there shall be added five per centum upon the amount of the half so remaining due."

"(6). The collector shall proceed to collect all of the taxes assessed * * * as long as the same are allowed by the City Charter, and by the ordinances of the City, to remain in his hands for collection."

"(7). If all taxes with which any person * * * is assessed be not paid before the 1st day of September, the collector shall distrain, except where one-half thereof has been paid, under the third section, * * *.

"(8). Any goods or chattels in the City belonging to the person or estate assessed with taxes may be distrained therefor."

"(10). No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained or sold for taxes assessed against the grantor in such deed, whilst such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

"(11). Where the collector or the collector of delinquent taxes, as the case may be, cannot find sufficient goods and chattels to distrain for taxes, any person indebted to or having in his hands estate of the party assessed with such taxes may be applied to for payment thereof out of such debt or estate and a payment by such person of the said taxes, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. If the person applied to do not pay so much as it may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall * * * procure from the Police Justice a summons * * * and from the time of the service of any such summons the said taxes shall constitute a lien on the debt so due from such person, or on the said estate in his hands."

"(20). If there be good cause to believe that a person assessed with taxes, not owning real estate, intends to remove his property out of the City, or to sell out or close his business therein, the collector may, unless such taxes be paid on demand, distrain therefor, although the 1st day of September may not have arrived, and although one-half thereof may have been paid."

"(22). * * * It shall be the duty of the said collector * * * on the first Monday in February of

each year to turn over to the Auditor of the City all bills, assessments and accounts for all preceding years upon which there shall then remain unpaid any part of any tax or assessment due the City, and thereupon the said auditor shall turn over the same to the collector of delinquent taxes who shall proceed to collect the same * * * and who shall have the same power to collect, by the same methods and processes, all tax bills, assessments and accounts delivered to him as are conferred by the charter and the ordinances of the City upon the collector of the City taxes."

It is thus apparent that the City of Richmond is given an unlimited lien for its taxes, by necessary implication if not by express provision, and the rights of the landlord being limited by V. C. Section 2792, Supra, he can distrain for rent only subject to the rights of the City.

The case, having been thus summarily stated, it is urged that the Writ of Certiorari asked for should be directed for the following general reasons:

1. The general rule of equity in such cases is thus stated in 2 Cooley on Taxation, 3rd Ed., p. 834:

> "The Court having in its charge or under its control a fund or other property upon which taxes are due will, as a representative of the sovereignity, direct them to be paid without raising any question of the means of enforcement by process and before all other claims excepting judicial costs. Thus, upon proper application and suitable proof, a receiver will be ordered to satisfy a tax assessed against the property in his hands and a like direction will be made in other cases where funds are held subject to the order of a Court."

This principle is affirmed by Chief Justice Fuller in the case of *in re Tyler*, 149 U. S. 184, where he quotes with approval from *Greeley* v. *Provident Savings Bank*, 98 Mo. 458-460:

"The amount of the taxes was undisputed and the receiver had in his hands sufficient funds to pay them and we think the order should have been made. It may be conceded that the State would not have an express lien upon the assets that entered the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets * * * a right which it could have enforced through its Revenue Officer by the summary process of distress * * * but for the fact that the property and assets of its debtor had passed into the custody of its courts whose duty it was, in the administration and distribution of those assets, to respect that paramount right, upon the untrammelled assertion of which depends the power to protect the very fund being distributed and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the *distribution* of assets in *custodia legis* except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied and upon the receiver to see that the taxes due the state were paid before the estate was *distributed* to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt and be cut off unless presented to the court for allowance within a given time."

The fact that the property is in the custody of the Court "does not," says Chief Justice Fuller, "involve interruption in the payment of taxes or the displacement or impairment of the lien therefor, but on the contrary it makes it the imperative duty of the court to recognize as paramount and enforce with promptness and vigor the just claims of the authorities for the prescribed contributions to state and municipal revenue."

These principles are recognized and approved by Whittle, J., in the case of *Taylor* v. *Sutherlin-Meade Co.*, 107 Va. 797,

holding: "It is the universal rule that a court, as the representative of the sovereignity of the state, will make no order for the distribution of funds in *custodia legis* until provision is made for payment of taxes and levies due to the Commonwealth and its municipalities," citing *Alderson on Receivers*, p. 205; *Bank* v. *Ewing* (C. C. A.), 103 Fed. 168, and other cases. Indeed, in Virginia, we have a statute—Pollard's Code, Sec. 492 (b), Acts of Assembly 1897-98, p. 824—which provides as follows:

> "No decree or order shall be entered by any court of the Commonwealth directing the payment, *distribution or other distribution*, of any funds, securities, monies, or other property under its control, or under the control or in the hands of any receiver, commissioner, or other officer of the court, or any executor, administrator, trustee, or other fiduciary, unless it shall be made to appear to such court that *all taxes and levies* upon such funds, securities, monies, or other property, have been paid, or unless the payment thereof be provided for in such decree or order, and no commissioner, executor, administrator, trustee, or other fiduciary, receiver, trustee or bank, or other person or corporation shall pay out any funds in hand under the order of any court unless a receipt for the taxes is produced showing said taxes to have been paid, or unless such order shall so state."

See also Acts of Assembly, 1910, p. 96, Ch. 65. This Act of Assembly is similar to the Act of Congress, Rev. Stat. U. S., Sec. 3466, which requires that debts due to the United States shall be first satisfied, or, more strictly, to the provision in the Bankrupt Act of 1867, which gives priority of payment to all debts due to the United States and all taxes and assessments under the laws thereof, or to the state in which the proceedings were pending.

2. Section 64 (a) of the Bankrupt Act enacts this principle into the bankrupt law, over-riding any state law to the contrary, and places the state, county and municipality upon

the same footing as that of the United States itself. Taxes, whether a lien or not, are to be paid before any distribution is to be made to creditors.

*New Jersey* v. *Anderson*, 203 U. S. 483.
*Collier on Bankruptcy*, p. 889-892. 5th Ed. pp. 498-499.
*Re Prince and Walter*, 131 Fed. 546.
*Re Tilden*, 91 Fed. 500.
*Re Tebo*, 101 Fed. 419.
*Re Heilberg*, 96 A. B. R. 714.
*Re Crammond*, 145 Fed. 966.
*Yoke Vitrified Brick Co.*, 180 Fed. 235 (Conclusion of Opinion).
*Loveland on Bankruptcy*, 3rd Ed., Sec. 276 (a), p. 769.
*Remington on Bankruptcy*, Sec. 703, p. 423 and 1322.

3. Since the decision of the case at bar must apply to the United States itself, in a similar case, the revenues of the city, state and nation may properly be said to be involved, and it thus presents a question of gravity.

4. The decision of the United States Circuit Court of Appeals for the Fourth Circuit, which this petition asks to have reviewed, is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Waco* v. *Bryan*, 62 C. C. A. 79, 127 Fed. 79; and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Chattanooga* v. *Hill*, 71 C. C. A. 584, 137 Fed. 600. It is, we think, also in conflict with the decision of this Court in *New Jersey* v. *Anderson*, 203 U. S. 483, and with the case of *Dayton* v. *Stanard*, decided June 12, 1916, and reported in the S. C. R., Vol. 36, No. 16, p. 695, in which case a certiorari was granted on April 12, 1915.

*Dayton* v. *Stanard*, 238 U. S. 1493.
*In re Tyler*, 149 U. S. 184.
*Swartz* v. *Hammer*, 194 U. S. 441.
*Hecox* v. *Teller*, 198 Fed. 636.

5. The writ should issue because of the difference of opinion between the different Circuit Courts of Appeal, and in the interest of uniformity of decisions.

*Columbus Watch* v. *Robins*, 148 U. S. 266.
*In re Woods*, 143 U. S. 202-206.
*Chicago, &c., R. Co.* v. *Osborne*, 146 U. S. 354.
*Forsythe* v. *Hammond*, 166 U. S. 506.

6. The writ should issue because, under the state and municipal laws, the right of the sovereign to its taxes is superior to the right of a mere contract creditor. "Imperative necessity has forced a distinction between such claims (taxes), and all others."

*V. C. Secs.* 2791 *and* 2792.
*Murray's Lessee, et als*, v. *Hoboken Land Co.*, 18 Howard, 272-282.

7. The writ should issue because the Court below was in error in its definition of the word "dividends," contained in Section 64 (a) of the Bankrupt Act, and was in error in holding that laches on the part of the municipal officers could defeat the right of the municipality to its taxes and subordinate its lien to that of a landlord.

*In re Barber*, 97 Fed. 547.
*In re Weissman*, 178 Fed. 115.
*In re Fisher*, 148 Fed. 907.
*Dillon on Mun. Corp.*, Vol. 4, Sec. 1414.
*Powell* v. *Richmond*, 94 Va. 79.

8. The Court below was in error in holding that the words "taxes due thereon" confined the lien of the city for its taxes to the identical shifting stock of goods of a merchant on which, or on the basis of which, the assessment for the current year was actually made. If this were so, it must also be held that "each article of property was subject to be sold only to the extent of the amount of taxes assessed upon it,

and would lead to great perplexity and confusion. The language "due thereon" applies to the collector's books, and not to the assessment of the property assessed. The legislature intended to bind all of the personal property in the hands of the tax payer from the time the collector received his warrant until it is paid." In this connection it will be remembered that Section 8 of Chapter 14, Richmond City Code, 1899 and 1910, provides that "any goods or chattels in the City belonging to the person or estate assessed with taxes may be distrained therefor."

*Hill* v. *Figley*, 23 Ill. 418-420.
27 *Am. & Eng. Enc. of Law*, 739, and cases cited.

9. The case of *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 40, is not binding in the case at bar because the Charter of the City of Richmond does not contain the limitation said to be contained in the Charter of the City of Petersburg. The case of *New Jersey* v. *Lovell*, 179 Fed. 321, which is relied on by the lower Court, expressly avoids deciding the point here in question. It does decide that taxes are not prior to "the actual and necessary cost of preserving the estate." The case of *Mills* v. *Virginia-Carolina Lumber Co.*, 164 Fed. 168, also relied on by the lower Court, prefers a lien creditor to "the costs of general administration of the bankrupt's estate." Both these decisions, as applied to the case at bar, seem in conflict with *New Jersey* v. *Anderson*, 203 U. S. 483; *Waco* v. *Bryan*; *Hecox* v. *Teller*, and *Chattanooga* v. *Hill*, *supra*. In the Lovell case the reasons given for the point actually decided are not contained in the quotation made by the lower Court in its opinion. These reasons are that taxes, if given precedence to the cost of preserving the estate, might "absorb the whole fund and leave unpaid the agency by which its payment was effective." The case of *Mills* v. *Virginia-Carolina Lumber Co.* endorses without reserve the reverse principle, *i. e.*, that lien creditors, though asserting their rights in bankruptcy proceedings, were entitled to be paid in full, notwithstanding the fact that the payment of the debt and interest consumed the entire proceeds, even to the exclusion of the

costs of the general administration. This latter holding is contrary to the principle of the Lovell case, and in direct conflict with *re Tebo*, 101 Fed. 419, and the writ prayed for should be granted, notwithstanding these cases.

For these reasons your petitioner prays that this Honorable Court will be pleased to grant a Writ of Certiorari in this case to the Circuit Court of Appeals for the Fourth Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

THE CITY OF RICHMOND,
GEORGE AINSLIE, *Mayor.*

GEORGE WAYNE ANDERSON,
*Assistant City Attorney.*

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STATE OF VIRGINIA,
CITY OF RICHMOND,
To-wit:

I, RICHMOND T. LACY, JR., a Notary Public in and for the state and city aforesaid, do certify that GEORGE AINSLIE, Mayor of the City of Richmond, personally appeared and made oath before me in my said city that the facts stated in the foregoing petition are true to the best of his knowledge, information and belief.

Given under my hand this 14th day of May, 1917.

RICHMOND T. LACY, JR.,
*Notary Public.*

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I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted.

GEORGE WAYNE ANDERSON,
*Counsel for Petitioner.*

## IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the matter of the petition of the City of Richmond, a municipal corporation, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States, for the Fourth Circuit, to bring before the Supreme Court of the United States the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock* v. *the City of Richmond.*

To JAMES E. CANNON, ESQ.,

*Counsel for Elizabeth W. Bird, Loulie W. Nolting, and Charles E. Whitlock.*

SIR:—

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of the City of Richmond, a municipal corporation, sworn to by the Mayor of the said City on the 14th day of May, 1917, I shall make the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, the 4th day of June, 1917, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated at Richmond, Virginia, this 21st day of May, 1917.

Yours truly,

GEORGE WAYNE ANDERSON,
*Assistant City Attorney, and*
*Counsel for Petitioner.*

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I acknowledge service of the foregoing notice, together with a copy of the petition and brief in this case on this the 21st day of May, 1917.

JAMES E. CANNON,
*Counsel for Elizabeth W. Bird,*
*Loulie W. Nolting, and*
*Charles E. Whitlock.*

## IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the matter of the petition of the City of Richmond, a municipal corporation, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States, for the Fourth Circuit, to bring before the Supreme Court of the United States the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock* v. *the City of Richmond*,

And now comes the petitioner above named by GEORGE WAYNE ANDERSON, Esquire, Assistant City Attorney, its counsel, attorney and proctor, and moves this Court upon a transcript of the record herein and upon the annexed petition, sworn to on the 14th day of May, 1917, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States, for the Fourth Circuit, and to the District Court of the United States for the Eastern District of Virginia, to bring before this Honorable Court the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners*, v. *the City of Richmond, Respondent*, recently decided by the Circuit Court of Appeals of the United States, for the Fourth Circuit, and by the District Court of the United States for the Eastern District of Virginia, for such proceedings therein as to this Court may seem just, and for such other and further relief in the premises as may be just.